

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,  
A CORPORATION.

Docket No. 9312

**NORTH TEXAS SPECIALTY PHYSICIANS' RESPONSE TO UNITED HEALTHCARE OF TEXAS'S  
MOTION TO QUASH OR LIMIT THE SUBPOENAS SERVED BY NORTH TEXAS SPECIALTY  
PHYSICIANS**

Respondent North Texas Specialty Physicians ("NTSP") files this response to United HealthCare of Texas's ("United") Motion to Quash or Limit both the subpoena *duces tecum* and the subpoena *ad testificandum*. In support, NTSP shows the following:

**I.  
Background**

On December 18, 2003, NTSP served a subpoena *duces tecum* on United after learning from Complaint Counsel that United may have provided documents to Complaint Counsel voluntarily and without compulsory process. On January 12, 2004, NTSP served a subpoena *ad testificandum* on United. Depositions of United's corporate representatives were taken on January 29-30, 2004. On January 23, 2004, less than a week before these scheduled depositions and over a month after receiving the production request, United filed a Motion to Quash or Limit both subpoenas, attempting to limit the documents it will have to produce and the questions United's corporate representatives will have to answer. NTSP contests each of United's grounds for this motion and asks the Administrative Law Judge to enforce the

subpoenas as written. NTSP additionally requests that it be allowed to re-depose United's corporate representatives within ten days of the Administrative Law Judge's order and that these representatives be required to fully answer questions that were not answered at the scheduled depositions. NTSP also learned in a deposition of United's corporate representative last week that United has voluntarily made its claims database available to Complaint Counsel by running analyses for Complaint Counsel.

## **II. Argument and Authorities**

United argues that document requests for materials produced previously to the Texas Attorney General and cost information and comparisons previously compiled by United are irrelevant and unduly burdensome. These document requests are neither. Discovery is allowed in an FTC proceeding of anything "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent."<sup>2</sup> Discovery should only be limited if the burden outweighs the benefit.<sup>3</sup>

Both challenged discovery requests are calculated to yield information relevant and vital to NTSP's defense in the pending FTC proceeding. NTSP has been accused of restraining trade and otherwise hindering competition by using price fixing to obtain supra-competitive prices and deprive payors like United of the benefits of competition between providers.<sup>4</sup> NTSP needs information on the prices and practices in the marketplace between payors and NTSP providers as well as between payors and unrelated providers to show in its defense that NTSP has not

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<sup>2</sup> 16 C.F.R. § 3.31(c)(1).

<sup>3</sup> *Id.*

<sup>4</sup> See Complaint, ¶¶ 11-12, 16-17, 23-24.

obtained supra-competitive prices and that competition in the marketplace has not been otherwise harmed by its actions. NTSP also intends to show that its network not only has caused overall physician costs to be lower than they otherwise would have been, but also has caused the utilization of hospitalization, pharmacy, and health insurance to be less costly. The requests in this case seek exactly this information.

In response to United's objection to the definition of United HealthCare of Texas, Inc., that it contends includes all United affiliates across the country, only United HealthCare of Texas, Inc., or related entities which dealt with NTSP or have other responsive data would appear to need to respond.

**A. Requests numbers 2 and 3 for documents previously requested by and provided to the Office of the Attorney General of the State of Texas<sup>5</sup> are not unduly burdensome.**

Appendix A of the subpoena provided a letter United received from the Texas Attorney General detailing a document request that United responded to, at least in part, by producing documents and other information in electronic form. These are the same documents that NTSP now requests. United should have already assembled and produced these same documents. NTSP's original request included updated information through June of 2002, but NTSP has

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<sup>5</sup> "All documents previously produced or otherwise sent to the Office of the Attorney General of the State of Texas concerning business relationships with healthcare providers in the State of Texas, including specifically but without limitation the documents provided in response to the Written Notice of Intent to Inspect, Examine and Copy Corporate Documents served in or about March 2002 (a sample of such Written Notice is attached hereto). [At your option, check registers as described in Class 6 of Exhibit C need not be produced]. Such documents should be provided in electronic form only." and "Documents for the time period January 1, 2000 to June 30, 2002 described in Exhibits A through C of the above-referenced Written Notice of Intent to Inspect, Examine and Copy Corporate Documents to the extent such documents are not produced in response to Request No. 2 above. [At your option, check registers as described in Class 6 of Exhibit C need not be produced]. Such documents should be provided in electronic form only."

agreed to limit its request to the dates specified by the Attorney General, which makes United's production even less burdensome.<sup>6</sup>

United complains that limiting the request to 13 counties will involve "extensive programming efforts" and create a burden. United does not need to limit the request. NTSP only agreed to limit the request to those counties to assist United with compliance and ensure that NTSP would received this much needed data.<sup>7</sup> If United now claims that the requested limitation creates a burden, it may respond with information for the entire State of Texas. United's estimations of burden addressed only the problem of extracting data by county.<sup>8</sup> For updating information as sent to the Attorney General, it stated only that "the data would have to be gathered and reviewed."<sup>9</sup>

The testimony of United's corporate representative also shows that there will be no undue burden on United. [

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.<sup>11</sup> United ran similar, specifically requested reports for

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<sup>6</sup> See Exhibit 3, United's Motion to Quash, Affidavit of Helene D. Jaffe, ¶ 7.

<sup>7</sup> *Id.*, ¶¶ 7, 10-11.

<sup>8</sup> See Exhibit 4, United's Motion to Quash, Affidavit of Jennifer Cook, ¶¶ 5-6.

<sup>9</sup> *Id.*, ¶ 4.

<sup>10</sup> See Deposition of David W. Ellis, attached as Exhibit B, p. 9-10, 21:9-22:22.

<sup>11</sup> See Exhibit B, Deposition of David W. Ellis, p. 4-7, 8:10-15:1; p. 8-9, 18:23-20:24.

Complaint Counsel.<sup>12</sup> NTSP has not even requested that United run reports; all NTSP has requested is access to this one database containing information highly relevant to the analysis of marketplace activity required for its defense.

The relevance of this information outweighs any burden on United. The requested data is vital to NTSP's defense in this proceeding. Any confidential or privileged information is easily dealt with under the current protective order and the privilege log requirement. The burden is on the party challenging the subpoena, United, to prove that the subpoena is unduly burdensome.<sup>13</sup> United's conclusory statements and mistaken determination of the issues in this proceeding do not meet that burden.

**1. This information is highly relevant to NTSP's defense.**

The documents and information requests are highly relevant. United's relationships with all healthcare providers in the state of Texas will be evidence of NTSP's conduct, other healthcare providers' conduct, and the effects of such conduct considering the entire market. Although the Texas Attorney General's investigation was not related to the current proceeding, the information requested in that investigation is extremely relevant to the current proceeding. United is not qualified to determine what information is or is not relevant to the issues in this proceeding or to NTSP's defense. United has erroneously asserted that this data cannot be relevant because it does not relate to price fixing or United's negotiations with NTSP and also

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<sup>12</sup> See Exhibit B, Deposition of David W. Ellis, p. 14-15, 33:24-34:4; p. 15, 34:21-35:7; p. 17, 39:3-40:16.

<sup>13</sup> *Plant Genetic Sys. v. Northrup King Co.*, 6 F. Supp. 2d 859, 862 (E.D. Mo. 1998).

because it does not contain information on provider location or reimbursement policies. But this data is relevant for other reasons that United fails to recognize.

To prepare for its defense, NTSP needs to know how it treats patients compared to other physicians and physician groups. NTSP intends to show that it has actually lowered physician expenses, including costs from inpatient care, hospitals, pharmacies, and other facilities. The Attorney General's requests encompassed six categories of claims data that each contain information that will allow NTSP to make these relevant comparisons: (1) eligibility; (2) authorizations/referrals; (3) claims/encounters; (4) capitation; (5) adjudication logics; and (6) check registers.<sup>14</sup> United was free to withhold check register information, so only the first five requests will be addressed.

The eligibility information requested includes primary care physician names and other identification, IPA or Group names and other identification, the total premium cost, and the breakdown of where that premium was spent.<sup>15</sup> This information will allow NTSP to compare its rates and breakdown of payments to that of other IPAs or Groups as well as that of individual physicians. It will also give NTSP insight into the activities of other IPAs or Groups in the marketplace.

The authorization and referral information requested includes the referring provider, the number of visits authorized, the type of service authorized, and the valid dates for authorization.<sup>16</sup> This information reflects the efficiency of provider referrals and authorizations. It also allows

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<sup>14</sup> See Attorney General's Written Notice of Intent to Inspect, attached as Exhibit A, p. 8.

<sup>15</sup> *Id.* at p. 10.

<sup>16</sup> *Id.* at p. 11.

NTSP to discover the other costs incurred by patients due to the direct action of their providers and determine the effectiveness of NTSP providers in lowering costs.

The claims and encounter information requested includes primary care physician and provider names and other information, details on service provided, and payment information, including details on capitation, fee-for-service claims, and fee schedules.<sup>17</sup> The Attorney General's instructions even explain that the "disposition of submitted claims or encounters is dependent upon ... applicable fee schedule[s] and provider contracts."<sup>18</sup> The capitation information requested includes primary care physician and IPA or Group name, capitation rates, and actual amounts paid.<sup>19</sup> The adjudication logic information requested includes "any logic or rules used to value or pay claims...".<sup>20</sup> Information related to contracts, fee schedules, and payments between payors and providers is at the heart of this proceeding because it shows market behavior and can be used to determine whether NTSP's conduct is different from that of its competitors or has anti-competitive effects.

The relevance of the requests is not affected merely because United's data does not include provider location or reimbursement policies. First, the information would still be relevant without knowing either provider location or payor policy, as explained previously. Second, both can be determined from the information provided. Although there is no field for provider location, United will be able to supply provider names and IDs as well as applicable IPA or Group names and IDs. Although reimbursement policies are not explicitly given, information on

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<sup>17</sup> *Id.* at pp. 14-15.

<sup>18</sup> *Id.* at p. 13.

<sup>19</sup> *Id.* at pp. 18-19.

<sup>20</sup> *Id.* at p. 20.

capitation rates, fee schedules, actual payments, and other similar cost information will demonstrate United's policies and practices.

Further, the testimony of United's corporate representative supports the relevance of this data. [

] <sup>21</sup> [

] <sup>22</sup> [

] <sup>23</sup> These explanations of United's own business practices demonstrate that NTSP must obtain the data it requested in the subpoena *duces tecum*, not only for NTSP physicians, but also for other physicians in the market, so that NTSP can make proper efficiency comparisons.

**2. United claims NTSP's request for data is irrelevant and unduly burdensome, yet it provided special reports of similar data to Complaint Counsel.**

During the deposition of United's corporate representative, NTSP learned that United's position on providing claims data to NTSP is much different than United's position with regard to requests made by Complaint Counsel. Although United claims that merely providing the data to NTSP is unduly burdensome, United, at the request of Complaint Counsel, looked at claims data like that requested by NTSP and actually ran special reports specifically requested by Complaint Counsel.<sup>24</sup>

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<sup>21</sup> See Exhibit B, Deposition of David W. Ellis, p. 4-7, 8:10-15:1; p. 8-9, 18:23-20:24.

<sup>22</sup> See Exhibit B, Deposition of David W. Ellis, p. 4, 8:10-23; p. 9, 20:25-21:8.

<sup>23</sup> See Exhibit B, Deposition of David W. Ellis, p. 10, 22:23-23:2.

<sup>24</sup> See Exhibit B, Deposition of David W. Ellis, p. 14-15, 33:24-34:4; p. 15, 34:21-35:7; p. 17, 39:3-40:16; see also Deposition Exhibits 3038, 3046, and 3048, attached as Exhibit C.

United's actions are not only inconsistent with the arguments it sets forth in its motion, but are patently unjust in light of NTSP's effort to ease United's burden when responding to the subpoena. NTSP sought only the data, with no special reports. NTSP sought information that has already been assembled and produced. And NTSP will go one step further and ask that United produce only the claims data that was provided to the Texas Attorney General in electronic form so that NTSP may conduct its own analyses. Unless NTSP has such data, NTSP is effectively foreclosed from conducting analyses in rebuttal to those conducted by payors at Complaint Counsel's request.<sup>25</sup>

United's argument that such information is irrelevant is clearly not supported by the testimony of its corporate representative or the actions it took to assist Complaint Counsel in its case. Instead, it shows that NTSP's request for data was, in fact, more targeted than United would lead the Administrative Law Judge to believe. As such, United should not be allowed to decide what is relevant or irrelevant to NTSP's case and deny NTSP access to information, when it has already provided Complaint Counsel with similar claims data.

**3. The information is not immune from discovery because of confidentiality, and if it is actually confidential, it is adequately protected by the protective order in this proceeding.**

United's claim that these documents are protected by statute is erroneous. The statute cited by United only prevents the Attorney General from producing these documents in response to an open records request; it does not insulate United from otherwise producing the documents elsewhere.<sup>26</sup> NTSP has not requested these documents from the Attorney General; it is

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<sup>25</sup> NTSP has also learned that at least one other payor (Aetna Health Inc.) has also extracted data from its database for Complaint Counsel.

<sup>26</sup> Tex. Rev. Civ. Stat. Ann. art. 1302-5.04 states only, "The Attorney General, or his authorized assistants or representative, shall not make public... ."

requesting them directly from United. These documents, if generally described in a request, would be available to NTSP from United. NTSP has merely tried to save United time and money by referencing a previously-assembled set of documents that United has readily available for production.

United also attempts to use the “sensitivity” of the documents as an excuse not to comply with the subpoena.<sup>27</sup> But a party claiming confidentiality must have specific proof that the information is confidential and that disclosure would be harmful.<sup>28</sup> The protective order currently in place in this proceeding more than adequately protects the confidentiality of any documents and prevents any harm from United’s compliance with the subpoena. The protective order provides that any information marked confidential can be used only for purposes of this matter and not for any business or commercial purpose and cannot be directly or indirectly disclosed to persons outside a limited list of persons associated with this proceeding.<sup>29</sup> In addition, information may be marked restricted confidential and may be disclosed *only* to outside counsel and experts with limited exceptions.<sup>30</sup> With this protection, the documents will not be seen by United’s competitors or the marketplace generally, and United will not be competitively harmed by this production. Also weighing in favor of production is that there is no absolute privilege for confidential information, and a claim of confidentiality can be rebutted by a showing

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<sup>27</sup> See United’s Motion to Quash, p. 2.

<sup>28</sup> *Centurion Indus., Inc. v. Warren Steurer and Assoc.*, 665 F.2d 323, 325 (10th Cir. 1981); *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 131 F.R.D. 668, 671 (S.D. Tex. 1990).

<sup>29</sup> Protective Order Governing Discovery Material, pp. 4, 9.

<sup>30</sup> *Id.*, pp. 6-7.

that the information is relevant and necessary.<sup>31</sup> As explained in the above section, NTSP has met this showing.

United finally claims that because patient information is included in the requested data, it prevents any compliance with the subpoena. Any privileged patient information may properly be redacted by United, but United must still provide the unprivileged portion of the records. Because this information should be stored in electronic form, with each separate piece of requested information in its own field, it should not be burdensome for United to delete those fields that are privileged. United also claims that replacing patient identification numbers with random unique identifiers will be burdensome. United admits that such random identifiers already exist for some of the requested data.<sup>32</sup> It asserts that for the rest of the requested data, a matching program must be used.<sup>33</sup> United's vague assertion that this programming will be "expensive and time consuming" is not enough to prove that production is unduly burdensome in light of the relevance of this information.<sup>34</sup> It is also hard to believe that United does not have to perform similar programming to redact protected patient information in the ordinary course of business or that developing this programming will be unduly burdensome when all the data is already in electronic form. A business cannot claim undue burden just because it generates massive records or has an inadequate record-keeping system.<sup>35</sup>

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<sup>31</sup> *Centurion Indus., Inc.*, 665 F.2d at 326; *Exxon Chem. Patents, Inc.*, 131 F.R.D. at 671.

<sup>32</sup> See Exhibit 5, United's Motion to Quash, Affidavit of Luis G. Zambrano, ¶ 9.

<sup>33</sup> *Id.*, ¶¶ 7-10.

<sup>34</sup> *Id.*, ¶ 10.

<sup>35</sup> *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976); see also *Fagan v. District of Columbia*, 136 F.R.D. 5, 7 (D. D.C. 1991).

Furthermore, under HIPAA, protected health information can be produced in the course of an administrative proceeding in response to an order of a court or administrative tribunal.<sup>36</sup> The Administrative Law Judge may, therefore, order that United produce the information requested by NTSP, which United can then designate as confidential under the terms of the Protective Order entered in this proceeding.

As an alternative, HIPAA also allows United to produce protected health information in response to a subpoena if it receives satisfactory assurance from NTSP that reasonable efforts have been made by NTSP to secure a qualified protective order.<sup>37</sup> To receive such satisfactory assurance, United must receive from NTSP a written statement and accompanying documentation demonstrating that NTSP has requested a qualified protective order from the court or administrative tribunal.<sup>38</sup> By this motion, NTSP seeks to give United the satisfactory assurance necessary for it to produce protected health information, which may be responsive to the subpoena *duces tecum*. In doing so, NTSP requests that the Administrative Law Judge, in its order concerning United's motion, (1) prohibit the parties from using or disclosing the protected health information produced by United for any purpose other than this adjudicative proceeding and (2) require the return to United or the destruction of the protected health information at the end of this adjudicative proceeding.<sup>39</sup>

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<sup>36</sup> 45 C.F.R. § 164.512(e)(1)(i).

<sup>37</sup> 45 C.F.R. § 164.512(e)(1)(ii)(B).

<sup>38</sup> 45 C.F.R. § 164.512(e)(1)(iv)(A)-(B).

<sup>39</sup> These are the requirements of a qualified protective order under HIPAA. See 45 C.F.R. § 164.512(e)(1)(v)(A)-(B) (stating that a qualified protective order must (A) prohibit the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and (B) require the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding).

**B. Request number 7 for documents comparing costs of health care<sup>40</sup> is relevant and not unduly burdensome.**

The documents requested, contrary to United's argument, do relate to issues in this proceeding. Any health care costs, including hospital, pharmacy and health insurance costs, are highly relevant to the pending action because they relate to the marketplace cost and availability of services similar to those offered by NTSP. NTSP holds itself out as a network of physicians that is not only efficient in providing physician services, but also is efficient in the utilization of hospitalization, pharmacy costs, and other services. Further, the costs of health insurance can reflect conduct of providers and payors in the marketplace. United's argument that cost information is irrelevant because it could be interpreted in many different ways is ridiculous. If the facts and evidence could only be interpreted one way, there would be no need for discovery.

The testimony of United's corporate representative further defeats United's relevance argument. [

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<sup>40</sup> "All documents concerning or relating to comparisons of the cost of physician services, hospital care, pharmacy cost, or cost of health insurance in the State of Texas."

<sup>41</sup> See Exhibit B, Deposition of David W. Ellis, at p. 4, 8:10-23; p. 4-5, 9:15-21; p. 6, 13:19-14:10; p. 8, 18:23-25.

United has not shown this request to be unduly burdensome; it has only made conclusory statements that responsive documents would “require an enormous amount of work to identify.”<sup>42</sup>

Conclusory statements will not meet United’s burden of proof. [

.] The document request is clear. The term “cost” refers to the external marketplace cost to patients and insurers. The comprehensibility of the request is evidenced by United’s own response – the cost comparisons and formulas used to run them mentioned by United are responsive documents.<sup>43</sup>

**C. Truly privileged materials are properly withheld as long as Aetna provides a privilege log.**

NTSP agrees that United has the right to withhold materials subject to the attorney-client, work product, or physician-patient privilege as long as United creates a privilege log. NTSP also agrees that United may withhold information related specifically to any “protected health information” of individuals. If such categories exist, they can be redacted as long as the remaining portions of the documents, including more general data needed by NTSP for its market analysis, are produced.

**D. The time for response was not unreasonable.**

The subpoena was sent to United on December 18, 2003, after NTSP had learned of, received, and reviewed United-related documents produced by Complaint Counsel. The deadline for beginning to produce documents was originally January 2, 2004, and NTSP gave

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<sup>42</sup> United’s Motion to Quash, p. 11.

<sup>43</sup> United’s Motion to Quash, p. 11.

United an extension, allowing United to begin producing documents on a rolling basis beginning on January 9, 2004. United complains about the subpoena *duces tecum*'s proximity to the holidays. Although not binding in the case of a time set in a subpoena, Federal Rule of Civil Procedure 6, relating to computation of time, is instructive. If the time period for compliance is more than 11 days, weekends and legal holidays are not excluded when calculating the time for compliance.<sup>44</sup> And even if these days were excluded, this would only have provided United a four-day extension until January 6, 2004, which is less than the extension agreed to by NTSP. United has now had the subpoena for over a month. Discovery was closed last week, and the final hearing in this proceeding is less than three months away. Considering that the original time period granted was not unreasonable, that NTSP has attempted to work with United for an additional three weeks, that it has already been over a month since the subpoena was served, and the urgency of NTSP receiving this important information before upcoming deadlines<sup>45</sup>, NTSP asks that the Administrative Law Judge, upon denying the Motion to Quash or Limit the subpoenas, set the compliance date for the subpoena *duces tecum* to five days from the date of that order.

**E. United is not entitled to recover its costs of production.**

The FTC Rules of Practice in Adjudicative Proceedings do not contain any provisions for the shifting of costs from the producing party to the requesting party. Therefore, it is improper for United to request recovery of its costs of production from NTSP.

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<sup>44</sup> Fed. R. Civ. P. 6(a).

<sup>45</sup> Close of discovery was January 30, 2004; deadline for filing motions for summary decision is March 2, 2004; and hearing is set for April 28, 2004. See Scheduling Order.

**F. The deposition examination topics should not be limited.**

The deposition examination topics objected to by United track the document requests for information requested by the Texas Attorney General and information on costs and cost comparisons in the State of Texas. Since these topics have been shown to be relevant, not unduly burdensome, and adequately protected by a protective order, the Administrative Law Judge should not allow United to avoid answering questions related to these topics. To the extent United attempted to do so during its depositions, NTSP should be allowed to re-depose on these topics.

**III.  
Conclusion**

In light of the responses to United's objections contained herein, NTSP requests that the Administrative Law Judge (a) deny in whole United's Motion to Quash or Limit the Subpoenas Served by North Texas Specialty Physicians; (b) order United to fully comply with the subpoena *duces tecum* within five days of the Administrative Law Judge's order; (c) order United's representatives to fully comply with the subpoena *ad testificandum* at the scheduled depositions, or, alternatively, if this motion is ruled on after the depositions have taken place and United's representatives have refused to fully answer questions related to the examination topics noticed in the subpoena *ad testificandum*, allow NTSP to re-depose the United representatives within ten days of the Administrative Law Judge's order; and (d) grant and order such further relief to which NTSP may be justly entitled.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Gregory S. C. Huffman', is written over a horizontal line.

Gregory S. C. Huffman  
William M. Katz, Jr.  
Gregory D. Binns

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**ATTORNEYS FOR NORTH TEXAS  
SPECIALTY PHYSICIANS**

**CERTIFICATE OF SERVICE**

I, Gregory D. Binns, hereby certify that on February 5, 2004, I caused a copy of the foregoing to be served upon the following persons:

Michael Bloom (via certified mail and e-mail)  
Senior Counsel  
Federal Trade Commission  
Northeast Region  
One Bowling Green, Suite 318  
New York, NY 10004

Barbara Anthony (via certified mail)  
Director  
Federal Trade Commission  
Northeast Region  
One Bowling Green, Suite 318  
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Hon. D. Michael Chappell (2 copies via Federal Express)  
Administrative Law Judge  
Federal Trade Commission  
Room H-104  
600 Pennsylvania Avenue NW  
Washington, D.C. 20580

Office of the Secretary (via Federal Express)  
Donald S. Clark  
Federal Trade Commission  
Room H-159  
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George J. Hazel (via certified mail and Federal Express)  
Counsel for United HealthCare of Texas  
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and by e-mail upon the following: Susan Raitt ([srait@ftc.gov](mailto:srait@ftc.gov)) and Jonathan Platt ([jplatt@ftc.gov](mailto:jplatt@ftc.gov)).



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Gregory D. Binns

# **Exhibit A**



OFFICE OF THE ATTORNEY GENERAL • STATE OF TEXAS  
JOHN CORNYN

March 29, 2002

Attention Corporate Officers and Agents  
United Healthcare of Texas, Inc.  
CT Corporation System  
350 North St. Paul Street  
Dallas, TX 75201

VIA Certified Mail #7001 2510 0007 0331 9113

Re: Written Notice of Intent to Inspect, Examine and Copy Corporate Documents  
pursuant to Art. 1302-5.02 of the Texas Miscellaneous Corporation Laws Act.  
Health Maintenance Organization Documents

Attention Corporate Officers and Agents of United Healthcare of Texas, Inc.:

Please be advised that the Texas Attorney General has authorized and directed that the Consumer Protection Division (hereafter, "CPD") inspect, examine and review certain books, records and other documents related to United Healthcare of Texas, Inc.'s (hereafter, "United") Texas Health Maintenance Organization (hereafter, "HMO") business pursuant to the Texas Miscellaneous Corporation Laws Act, TEX. REV. CIV. STAT. ANN. ART. 1302-5.01 - Art. 1302-5.06. Therefore, CPD requests that United produce the books, records and other documents as specified in the attached Exhibits A, B and C within the next thirty days. If United chooses to cooperate with this request, these documents should be produced to Assistant Attorney General Robert C. Robinson, III, Consumer Protection Division, 300 West 15<sup>th</sup> Street, Suite 900, Austin, Texas 78701.

As an alternative to producing the electronic file copies of the requested documents according to the terms specified in the attached Exhibits A, B and C, please notify CPD of the dates United will make its electronic databases and systems that contain the requested electronic data accessible to CPD for inspection, examination and copying at United's offices. If United chooses this option, such electronic databases and systems shall be made available for inspection, examination and copying beginning no later than April 29, 2002, and continuing until such inspection, examination and copying is complete. Upon arrival at United's offices, the Attorney General's assistants and representatives shall present United with a letter confirming that each is authorized to conduct the inspection, examination and copying of United's books, records and other documents.

The documents specified in the attached Exhibits A, B and C are requested as part of the Attorney General's investigation of possible violations of Section 17.46(a) of the Deceptive Trade Practices Act and Section 3 of the Unfair Competition and Unfair Practices Act, Texas Insurance Code, Article 21.21. The documents as specified in the attached Exhibits A, B and C may show or tend to show that United has been or is engaged in acts or conduct in violation of its charter rights and privileges, or in violation of the laws of this State.

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CPD shall return all documents, and all copies of documents, produced by United pursuant to this inspection and examination prior to closing this investigation. In the meantime, it is CPD's position that such documents are not subject to production pursuant to an open records request as provided by Art. 1302-5.04 of the Texas Miscellaneous Corporation Laws Act. CPD is not requesting confidential patient information.

If it is easier to do so, the documents responsive to this request to inspect, examine, and copy documents may be produced in coordination with the documents to be produced in response to the separate request issued today for records related to United's PPO business in Texas.

Please be advised that any corporation that fails or refuses to permit the Attorney General or his authorized assistants or representatives to examine or to take copies of any of its said books, records or other documents pursuant to the Texas Miscellaneous Corporation Laws Act, "shall thereby forfeit its right to do business in this State; and its permit or charter shall be canceled or forfeited." Art. 1302-5.05.A. Additionally, any officer or agent of a corporation who fails or refuses to permit the Attorney General or his authorized assistants or representatives to examine or to take copies of any of its books, records or other documents pursuant to the Texas Miscellaneous Corporation Laws Act, "shall be fined not less than one hundred dollars nor more than one thousand dollars, and be imprisoned in jail not less than thirty nor more than one hundred days. Each day of such failure or refusal is a separate offense." Art. 1302-5.05.B.

Should you have any questions regarding production of the requested documents according to the terms specified in the attached Exhibits A, B and C, or any interest in discussing this matter further, please contact me at (512) 475-4360, or by fax at (512) 322-0578. CPD is confident that United shares the Attorney General's interest and desire to resolve these allegations of improper payment practices, and we look forward to United's cooperation in this endeavor.

Yours truly,



Robert C. Robinson, III  
Assistant Attorney General  
Consumer Protection Division

cc: Ms. Deb Goldstein and Mr. Greg Coleman  
WEIL, GOTSHAL & MANGES L.L.P.  
Via Facsimile: (214) 746-7777 and (512) 391-6879

**HMO DOCUMENT EXAMINATION, EXHIBIT A**  
**DEFINITIONS**

1. "Company," "you," "your," "your company," and "United" mean each entity to which this Examination is addressed; its parent; and its merged, consolidated, or acquired predecessors, divisions, subsidiaries, and/or affiliates. These terms include any and all directors, officers, equity owners, representatives, employees, agents, attorneys, successors, and assigns of United. The terms also include all natural persons and entities acting or purporting to act for the above, and any predecessor, successor, affiliate, subsidiary or wholly owned or controlled entity. The phrase will be construed to include present and former officers, agents, employees, directors, representatives, consultants, attorneys, associates and all other persons acting or purporting to act for you, and any predecessor, successor, affiliate, or subsidiary entity or person(s), including all present and former officers, agents, employees and all other persons exercising or purporting to exercise discretion, to make policy, or to make decisions.
2. Without limiting the term, a document is deemed to be within your "control" if you have ownership, possession, or custody of the document, or superior right to secure the document or copy of it from any person or public or private entity having physical possession of it.
3. "Any" means all.
4. "Claim" means any health care provider's request for payment for emergency, medical or other health care services, supplies or equipment furnished to an individual patient recipient. For the purposes of the six classes of electronic document claim records requested by Exhibit C, a single claim may have multiple suffixes and claim lines, and each claim line will have multiple fields.
5. "CMS" means Centers for Medicare and Medicaid Services.
6. "Code" means any code, edit and/or modifier used to specify, to sequence or otherwise to describe the services for which the provider is submitting a claim.
7. "Correct Coding Initiative," "CCI" and "NCCT" mean the CMS National Correct Coding Initiative system for codes, edits and modifiers that is utilized nationally by all Medicare carriers in the claims processing systems those Medicare carriers use to determine payments to providers. CMS developed CCI to promote national correct coding methodologies and to control improper coding leading to inappropriate payment in Medicare Part B claims. CMS developed its CCI coding policies based on coding conventions such as those defined in the American Medical Association's (hereafter, "AMA") Current Procedural Terminology ("CPT") manual, national and local policies and edits, coding guidelines developed by national societies, analysis of standard medical and surgical practices and a review of current coding practices.
8. "CPT" code or "CPT code" means any Current Procedural Technology code as defined and licensed by the AMA.

9. "Database" - In addition to its common meaning, the term "database" shall include the terms "data bank" and shall mean and refer to any structured collection of electronic information organized into records or rows, together with all other electronic data whose presence is needed to analyze and view the information in a full and meaningful way. This Examination requests electronic data documentation from your databases and/or data banks that contain information about any and all claims by any health care provider that provides services to your members with all codes and/or programming instructions and other materials necessary to understand and use such electronic data documentation.
10. "Document" means and includes all written, printed, recorded and graphic matter, regardless of authorship, both originals and nonidentical copies, in your possession, custody or control, or known by you to exist, despite whether the writing was intended for or transmitted internally by you, or intended for or transmitted to any other person or entity. It includes communications in words, symbols, pictures, photographs, sounds, films and tapes, and information stored in or accessible through computer or other information storage and retrieval systems, with all codes and/or programming instructions and other materials necessary to understand and use such systems.
11. "Examination" means this Written Notice of Intent (and Request) to Inspect, Examine and Copy Corporate Documents as issued at the direction of the Attorney General pursuant to Art. 1302-5.02 of the Texas Miscellaneous Corporation Laws Act.
12. "HCPCS" means the Health Care Finance Administration (CMS) Common Procedure Coding System for all providers and medical suppliers to code professional services, procedures and supplies for Medicare.
13. "Health Care Provider" includes any "physician" as that term is defined by TEX. INS. CODE Art. 20A.02(f) and also includes any "provider" as that term is defined by TEX. INS. CODE Art. 20A.02(t) as amended by Act of 1997, 75th Leg., ch. 1026, Sec. 3.
14. "ICD-9-CM" and "ICD9" code(s) means any International Classification of Diseases-9th revision-Clinical Modification codes used to classify morbidity and mortality information as such codes are approved by the American Hospital Association ("AHA"), CMS and the National Center for Health Care Statistics.
15. "Industry Standard Code(s)" include any and all codes, code edits, modifiers or coding methods as such codes and coding methods are specifically defined, required and/or used for claim submission compliance with the NCCI. Terms and definitions applicable to the NCCI standards may be found at [www.hcfa/medicare/ncci.html](http://www.hcfa/medicare/ncci.html). For coding methods not required by CCI or HCPCS, the term "industry standard code(s)" includes, but is not limited to, any and all CPT codes as licensed by the AMA, any and all ICD-9-CM codes as revised and approved by the AHA, CMS, and the National Center for Health Care Statistics.
16. "Member" includes any patient as the term patient is defined at TEX. INS. CODE Art. 21.58A, Section 2(16) (West 2002).

17. "PC Compatible" means an American Standard Code for Information Interchange ( hereafter, "ASCII") text file that can be read by a personal computer. Data in each PC compatible file should be fixed width.
18. "Provider" for purposes of this Examination shall have the same meaning as "Health Care Provider" unless otherwise specified.
19. "Relates to," "relating to," "regarding," and "connected to" mean and include any and all information that in any manner or form is relevant in any way to the subject matter in question, including without limitation all information that, directly or indirectly, contains, records, reflects, summarizes, evaluates, refers to, indicates, comments on, or discusses the subject matter, or that in any manner states the background of, or was the basis or were the bases for, or that record, evaluate, comment on, relate to or were referred to, relied on, utilized, generated, transmitted or received in arriving at your conclusion(s), opinion(s), estimate(s), position(s), decision(s), belief(s) or assertion(s) concerning the subject matter in question.
20. "Service(s)" means any emergency, medical or other health care services, procedures, supplies or equipment for which United receives a claim for payment from a health care provider.

**HMO DOCUMENT EXAMINATION, EXHIBIT B**  
**INSTRUCTIONS**

- A. Unless otherwise stated, the scope of this Examination relates to all specified books, data documents and records existing or created at any time during the period from January 1, 2000, to March 28, 2002, related to United's Texas HMO business.
- B. The electronic data document files requested in Exhibit C should be produced in PC Compatible format. Each file should be an ASCII text file that can be read by a personal computer. Data in each file should be fixed width. A sample demonstrating how the requested electronic files shall appear when printed in table format is attached as Exhibit D.
- C. Any failure to provide document(s) is not acceptable if you can obtain the document(s) from persons reasonably available to you or under your control.
- D. In any situation in which it is not clear in which capacity you are responding, you are to designate all relevant capacities.
- E. It is your responsibility to clearly designate which, if any, of the documents contain trade secrets according to § 17.61(f) of the TEX. BUS. & COM. CODE.
- F. Documents produced shall be complete and not redacted, submitted as originally prepared or as found in your files. You may submit legible copies instead of original documents.
- G. Documents should be numbered consecutively and marked with a United or personal identification and a unique consecutive control number.
- H. All documents and/or other data compilations that relate to the subject matter of this Examination shall be preserved and any ongoing process of document destruction involving such documents and/or data compilations should cease.
- I. Documents responsive to this Examination shall be produced according to the instructions and definitions outlined in Exhibit A, Exhibit B and Exhibit C.
- J. This Examination does not request data for Medicare plans. However, the meaning of each term used within Exhibits A, B, and C is to be defined and interpreted consistent with that term's definition as used by CMS, HCPCS and the NCCI. If you believe there is a direct contradiction between the meaning specifically given to a term within Exhibit A, B or C and the meaning given to that term as the term is used by CMS and the NCCI, please notify CPD of such belief and proceed with the understanding that the definition within Exhibit A, B, and C shall control.
- K. If United uses a broader definition of any term(s) defined or used within this Examination, please provide a written copy of the broader definition of such term(s).

- L. If United does not have the requested information for a specific field of any particular individual record stored within any database, and/or United does not otherwise have access to the requested information for any specific field of the given record, please leave the field blank to indicate that United does not have access to the requested information for the specific field of the particular record produced.
- M. As used herein, the words "and" and "or" should be construed either conjunctively or disjunctively as required by the context to bring within the scope of the request any answer, response or document that might be deemed outside its scope by another construction.
- N. All currency amounts requested for electronic data document data elements (fields) should be represented as dollars and cents with a plus or minus sign to indicate positive or negative amounts. The plus or minus sign should be the first character in the currency field. Currency amounts should be presented with the next eight digits for dollars and the last two for cents (without a decimal point).
- O. All dates for electronic data document data elements (fields) should be mmddyyyy format without spaces, "-", or "/".
- P. All text for electronic data document data elements (fields) should be left justified without leading spaces.
- Q. Place of service, type of service, CPT codes, and ICD9 codes should be industry standard codes. If industry standard codes are not used (e.g., if there is no applicable industry standard code as the term industry code is defined in Exhibit A), or if the codes used include any variations from industry standard codes, an electronic file containing any and all applicable lookup tables and/or data dictionaries should be provided. The electronic file containing the lookup table(s) and/or data dictionary(ies) shall include each non-industry standard code, each variation from an industry standard code and a description of each. The layout of the lookup table(s) and/or data dictionary(ies) should also be provided in the electronic data file. As with all electronic file copies requested by this Examination, this electronic file should be PC Compatible. Each file should be an ASCII text file that can be read by a personal computer. Data in the electronic data file should be fixed width delimited. The electronic data file produced in response to this Instruction Q should be labeled as responsive to Instruction Q.

**HMO DOCUMENT EXAMINATION, EXHIBIT C**  
**Electronic Data Documents**

CPD requests the six classes of electronic data documents as follows:

- Class 1 Eligibility**
- Class 2 Authorizations/Referrals**
- Class 3 Claims/Encounters**
- Class 4 Capitation**
- Class 5 Adjudication Rules**
- Class 6 Check Register**

**HMO DOCUMENT EXAMINATION, EXHIBIT C****Specific Electronic Data Document Class 1  
Eligibility**

To assure that United understands the data elements requested regarding Document Class 1, specific instructions and definitions for production of Class 1 documents are detailed below.

Two electronic data document files are requested for each of the 26 (twenty-six) months specified within Class 1 below. For each of the 26 (twenty-six) months, please provide one electronic data file showing eligibility information for each person who was a United member during that month as such information was available to the provider, from United, during that month the service was provided, and one electronic data file showing eligibility for each person who was a United member during that month as eligibility for that month exists with all retroactive additions, deletions and other adjustments incorporated as of March 28, 2002.

Please provide the two separate files for each month showing all members eligible during that month. Please label the 52 separate eligibility files as shown below.

1) Eligibility information as it was available to the provider, from United, during that month. Example: jan2000.txt will contain eligibility information, as it was available to the provider in January of 2000 for members to whom the provider furnished services in January 2000.

Jan2000.txt	Jan2001.txt	Jan2002.txt
Feb2000.txt	Feb2001.txt	Feb2002.txt
Mar2000.txt	Mar2001.txt	
Apr2000.txt	Apr2001.txt	
May2000.txt	May2001.txt	
Jun2000.txt	Jun2001.txt	
Jul2000.txt	Jul2001.txt	
Aug2000.txt	Aug2001.txt	
Sep2000.txt	Sep2001.txt	
Oct2000.txt	Oct2001.txt	
Nov2000.txt	Nov2001.txt	
Dec2000.txt	Dec2001.txt	

2) Eligibility with all retroactive additions, deletions and other adjustments as of March 28, 2002.

Jan2000a.txt	Jan2001a.txt	Jan2002a.txt
Feb2000a.txt	Feb2001a.txt	Feb2002a.txt
Mar2000a.txt	Mar2001a.txt	
Apr2000a.txt	Apr2001a.txt	
May2000a.txt	May2001a.txt	
Jun2000a.txt	Jun2001a.txt	
Jul2000a.txt	Jul2001a.txt	
Aug2000a.txt	Aug2001a.txt	
Sep2000a.txt	Sep2001a.txt	
Oct2000a.txt	Oct2001a.txt	
Nov2000a.txt	Nov2001a.txt	
Dec2000a.txt	Dec2001a.txt	

The following Electronic Data Elements (Fields) are requested for each of the 52 Class 1 Electronic Data Document Files described above:

<u>Name</u>	<u>Description</u>	<u>Data Type</u>	<u>Length</u>
Month	Month eligibility is for	Text	8 (mmddyyyy)
Mbr_id	Member ID	Text	25
Mbr_Age	Member Age on first day of month	Text	4
Mbr_Sex	Member Sex (M, F, U)	Text	2
Mbr_DOB	Member Date of Birth	Text	8 (mmddyyyy)
PCP_last	Primary Care Physician Last Name	Text	25
PCP_first	Primary Care Physician First Name	Text	25
PCP_ID	Primary Care Physician ID	Text	25
CapIPA_ID	ID for IPA/GROUP paid by capitation	Text	25
IPAName	IPA OR GROUP Name	Text	25
Tot_premium	Total Premium	Text	11
PCP_Percent	PCP Percent of Premium	Text	11
Specialist_Percent	Specialist Percent of Premium	Text	11
Facility_percent	Facility percent of Premium	Text	11
Pharmacy_percent	Pharmacy Percent of Premium	Text	11
PCP_adjmbr	PCP adjusted member count	Text	11
Specialist_adjmbr	Specialist adjusted member count	Text	11
Facility_adjmbr	Facility adjusted member count	Text	11
Pharm_adjmbr	Pharmacy adjusted member count	Text	11
Product		Text	25
Plan		Text	25
LOB	Line of Business	Text	25
Benefit	Benefit Set	Text	25
Employer_ID	Employer ID	Text	25
Employer_name	Employer Name	Text	25

**HMO DOCUMENT EXAMINATION, EXHIBIT C**  
Specific Electronic Data Document Class 2  
Authorizations/Referrals

To assure that United understands the data elements requested regarding Class 2 Electronic Data Documents, below are specific additional instructions and definitions for production of Class 2 documents.

- Authorization Number* is the number assigned to any authorization.
- Referral Number* is the number assigned to any referral.
- Provider ID* is the United identification number for the provider approved to perform service.
- Member ID* is the United identification number for the member.
- Requested by* is the name of the physician requesting the authorization number.
- Number of visits authorized* is the number of visits approved of as part of the authorization.
- Authorization for* describes the type of service authorized.
- Authorized from date* is the first date for which the authorization is valid.
- Authorized to date* is the last date for which the authorization is valid.
- Comments* documented comments associated with an authorization.

Please provide one file for each month showing authorizations created during that month.  
Please provide 26 separate authorization files labeled as shown below.

- |               |               |               |
|---------------|---------------|---------------|
| Jan00auth.txt | Jan01auth.txt | Jan02auth.txt |
| Feb00auth.txt | Feb01auth.txt | Feb02auth.txt |
| Mar00auth.txt | Mar01auth.txt |               |
| Apr00auth.txt | Apr01auth.txt |               |
| May00auth.txt | May01auth.txt |               |
| Jun00auth.txt | Jun01auth.txt |               |
| Jul00auth.txt | Jul01auth.txt |               |
| Aug00auth.txt | Aug01auth.txt |               |
| Sep00auth.txt | Sep01auth.txt |               |
| Oct00auth.txt | Oct01auth.txt |               |
| Nov00auth.txt | Nov01auth.txt |               |
| Dec00auth.txt | Dec01auth.txt |               |

Each field provided in each Class 2 record should correspond to the authorization number for that record.

The following Electronic Data Elements (Fields) are requested for each record of the 26 Class 2 Electronic Data Document Files described above:

<u>Name</u>	<u>Description</u>	<u>Data Type</u>	<u>Length</u>
Authorization_Nbr	Authorization Number	Text	25
Referral_Nbr	Referral Number	Text	25
Provider_id	Provider Identification Number	Text	25
Member_id	Member Identification Number	Text	25
Requested_by	Requested by	Text	25
Authorization_for	Services approved	Text	255
Visits	Number of visits	Text	3
From_date	First date authorization valid	Text	8 (mmdd/yyyy)
To_date	Last date authorization valid	Text	8 (mmdd/yyyy)
Comments	Comments	Text	1024

**EMO DOCUMENT EXAMINATION. EXHIBIT C**  
**Specific Electronic Data Document Class 3**  
**Claims/Encounters**

To assure that United understands the data elements requested in Electronic Data Document Class 3, below are specific instructions and definitions for production of Class 3 documents.

For purposes of this Electronic Data Document Class 3, the term *claim* means *submitted claims and encounters*.

It is CPD's understanding that disposition of submitted claims or encounters is dependent upon a number of factors including member eligibility, authorization, covered benefits, co-pay, deductible, co-insurance, applicable fee schedule and provider contracts. A single claim or encounter may have to be re-processed multiple times if errors are made during processing. Each time a claim or encounter is re-processed a new suffix number is assigned to the claim.

Document Class 3 includes both paid and denied claims. There should be one document file for each month showing each claim and each encounter entered during that month. Each of the Class 3 electronic document files should include all encounter information entered that month on each claim and each encounter paid via a capitation contract or delegated claims payment.

Example: Jan00claim.txt should include all claims entered in January 2000 regardless of the date of service or the date paid.

There should be 26 separate Class 3 claims/encounters document files labeled as follows:

- |                |                |                |
|----------------|----------------|----------------|
| Jan00claim.txt | Jan01claim.txt | Jan02claim.txt |
| Feb00claim.txt | Feb01claim.txt | Feb02claim.txt |
| Mar00claim.txt | Mar01claim.txt |                |
| Apr00claim.txt | Apr01claim.txt |                |
| May00claim.txt | May01claim.txt |                |
| Jun00claim.txt | Jun01claim.txt |                |
| Jul00claim.txt | Jul01claim.txt |                |
| Aug00claim.txt | Aug01claim.txt |                |
| Sep00claim.txt | Sep01claim.txt |                |
| Oct00claim.txt | Oct01claim.txt |                |
| Nov00claim.txt | Nov01claim.txt |                |
| Dec00claim.txt | Dec01claim.txt |                |

Each field provided in each Class 3 record should correlate to the claim number, line number and claim suffix for that record.

Below are definitions of data elements (fields) to be included in Class 3 Electronic Data Document Files.

The *claim number* is used like an invoice number to track a provider's request for payment.

If a provider performs multiple services for the same patient on the same day, each service is given a separate *claim line number*. Each time a claim or encounter is re-processed a new *claim suffix number* is assigned to the claim. The Class 3 electronic data files should include each *claim suffix number* assigned to the claim.

The health plan assigns a unique number to each member (covered life), the *Member ID*. This number is usually comprised of a subscriber number for the primary insured and a two-digit extension for the family member.

*Member Date of Birth* is the date when the covered life was born.

*Member Age* is the age of the member on the date of service.

*Employer ID* is a unique number assigned by United to identify each United employer contract.

*Employer Name* is assigned by United to identify the United employer contract.

*PCP ID* is the unique identification number assigned by United for the Primary Care Physician. A single physician may have multiple ID numbers corresponding to locations, contracts and tax IDs.

*PCP Name* is the full name of the Primary Care Physician.

*PCP Specialty* is the Specialty of the Primary Care Physician (General Practice, Family Practice, Internal Medicine, OBGYN).

*Place of Service* is the industry standard CMS code noting the place where service was performed.

*Type of Service* is the industry standard CMS code indicating the type of service performed.

*Date Admitted* is the first day of service for procedures performed over multiple days. (e.g., inpatient stays, observation and rehabilitation).

*Date Discharged* is the last day of service for procedures performed over multiple days. (e.g., inpatient stays, observation and rehabilitation).

*Discharge Status* is the patient condition at the point of discharge from an inpatient stay.

*ICD91* is the first level code assigned by the physician indicating the patient's diagnosis and/or co-morbid conditions.

*ICD92* is the second level code assigned by the physician indicating the patient's diagnosis and/or co-morbid conditions.

*ICD93* is the third level code assigned by the physician indicating the patient's diagnosis and/or co-morbid conditions.

*ICD94* is the fourth level code assigned by the physician indicating the patient's diagnosis and/or co-morbid conditions.

*ICD9 Procedure1* is a code used by some facilities to describe the first multiple procedure performed in conjunction with an inpatient stay.

*ICD9 Procedure2* is a code used by some facilities to describe multiple procedures performed in conjunction with an inpatient stay.

*ICD9 Procedure3* is a code used by some facilities to describe multiple procedures performed in conjunction with an inpatient stay.

*ICD9 Procedure4* is a code used by some facilities to describe multiple procedures performed in conjunction with an inpatient stay.

*Modifier 1* is a two-digit code used to describe variations impacting the payment of a CPT or HCPCS code. The modifier is used to indicate that a service or procedure that has been performed has been altered by some specific circumstance, but has not changed in its definition or CPT/HCPCS code.

*Modifier 2* is a two-digit code used to describe variations impacting the payment of a CPT/HCPCS code. The modifier is used to indicate that a service or procedure that has been performed has been altered by some specific circumstance, but has not changed in its definition or CPT/HCPCS code.

**DRG** is a code used to describe procedures performed in conjunction with inpatient care. (Inpatient claims)

**RevCode** is a code used to describe the revenue codes (e.g., semi-private room) used for inpatient stays. (Inpatient claims)

**Quantity** is used to indicate multiple prescriptions, tests, injections or procedures.

**Unit measure** is the unit of measurement applicable to health care services provided in units (e.g., milligrams)

**Date Paid** is the date claim adjudication was completed.

**Date Received** is the date the claim was received by United.

**Date Entered** is the date the claim was entered into the United system.

**Check Number** is the financial institution issued number on the check supplied to the provider as payment.

**Amount Submitted** is the amount submitted by the provider as their standard charge for the services provided.

**Amount Paid** is the amount paid by United to the provider.

**Amount Co-pay** is the amount paid for the claim by the member(patient) to the provider.

**Amount Withhold** is the amount that United withholds for possible future payment to the provider if the provider meets given criteria. For contracted providers, this amount should be determined according to the payment terms of United's contract with the provider.

**Amount Allowed** is the total amount, including co-pays, determined by United as the amount due the provider. For contracted providers, this amount should be determined according to the payment terms of United's contract with the provider.

**Capitation Allowed** is the total amount, including co-pays, determined by United as the amount United would have paid the provider if the furnished service was paid as a Fee for Service claim. For contracted providers, this amount should be determined according to the payment terms of United's contract with the provider.

**Amount Co-insurance** is an amount received by a secondary HMO/insurer that reduces the amount due to the provider from the primary HMO/insurer.

**Denial Code** is a code assigned by United to indicate why a claim was denied.

**Denial Message** is a description of why the claim was denied.

**Cap or PFS** indication of whether a claim was paid as a fee for service claim or capitation encounter.

**Fee Schedule Amount** is the total amount, including co-pays, corresponding to the fee schedule used by United to pay the claim. For contracted providers, this amount should be determined according to the fee schedule and other payment terms of United contract with the provider. This amount should be determined consistent with member benefits and procedures performed on the date of service.

**Provider ID** is a unique identification number assigned by United to identify a specific provider, provider contract, tax ID number and location.

**Provider First Name** is the provider's first name.

**Provider Last Name** is the provider's last name.

**Provider UPIN Number** is the number assigned to the provider by CMS.

**Provider Federal Tax ID** is the provider's federal tax identifier number assigned by the IRS.

**Provider State License Number** is the number assigned to the provider by the state board of medical examiners.

**Provider Specialty** is the medical specialty of the provider.

**Authorization Number** is the number assigned to the authorization.

**Entity Processing Claim** is the name of the company processing the claim, whether United or a company delegated to pay claims on behalf of United.

**Per Diem** indication as to whether claim payment is either procedure based (e.g., DRG) or per day (per diem) based.

**Code Change** indication that the code submitted by the provider has been changed and/or the code paid was different than the code submitted.

*Re-Bundled Claim* indication that a code(s) submitted on the claim has/have been consolidated and paid as a single procedure, or single set of procedures, instead of paid as separate codes as submitted.

The following Data Elements (Fields) are requested for each record of the 26 Class 3 Electronic Data Document Files described above:

<u>Name</u>	<u>Description</u>	<u>Data Type</u>	<u>Length</u>
Claim_number	Claim Number	Text	25
Line	Claim Line Number	Text	25
Suffix	Claim Suffix	Text	25
Member_ID	Member Identification	Text	25
Member_DOB	Member Date of Birth	Text	8(mmddyyyy)
Member_AGE	Member Age on date of claim	Text	3
Member_sex	Member Sex(M,F,U)	Text	2
Provider_ID	Provider ID	Text	25
Provider_First_Name	Provider first name	Text	25
Provider_Last_Name	Provider last name or company name	Text	25
Provider_specialty	Provider Specialty (AMA Code)	Text	25
Place_of_service	Place of Service	Text	25
Type_of_service	Type of Service	Text	25
Date_of_service	Date of Service	Text	8(mmddyyyy)
Date_admitted	Date Admitted	Text	8(mmddyyyy)
Date_discharged	Date Discharged	Text	8(mmddyyyy)
Discharge_status	Discharge Status	Text	25
ICD91	First ICD9 diagnosis	Text	8
ICD92	Second ICD9 diagnosis	Text	8
ICD93	Third ICD9 diagnosis	Text	8
ICD94	Fourth ICD9 diagnosis	Text	8
ICD9_Procedure1	First ICD9 procedure	Text	8
ICD9_Procedure2	Second ICD9 procedure	Text	8
ICD9_Procedure3	Third ICD9 procedure	Text	8
ICD9_Procedure4	Fourth ICD9 procedure	Text	8
CPT	CPT code (submitted)	Text	10
CPT_paid	CPT code (paid)	Text	10
Modifier1	First modifier	Text	2
Modifier2	Second modifier	Text	2
DRG	DRG	Text	25
Revcode	Revenue Code	Text	5
Quantity	Number of units	Text	5
Unit_measure	Basis unit of measure	Text	25
Authorization_Nbr	Authorization number	Text	25
Date_Paid	Date paid	Text	8(mmddyyyy)
Amount_Submitted	Amount of claim submitted by provider	Text	11
Date_Received	Date claim received by United	Text	8(mmddyyyy)

Date_Entered	Date claim entered by United	Text	8 (mmdd/yyyy)
Check Number	Financial institution issued number of the check that included payment for the claim	Text	25
Amount_ClaimPaid	Amount paid for the claim	Text	11
Amount_Co-pay	Amount co-pay by employee	Text	11
Amount_Withhold	Amount withheld	Text	11
Amount_Deductible	Amount of deductible	Text	11
Amount_Allowed	Amount allowed	Text	11
Amount_Co-ins	Amount paid by secondary carrier	Text	11
Fee_Amount	Fee Schedule amount	Text	25
Denial_code	Code for why claim was denied	Text	255
Denial_message	Description of why claim was denied	Text	25
Product		Text	25
Plan		Text	25
LOB	Line of business	Text	25
Employer_ID	Employer ID	Text	25
Employer	Employer Name	Text	25
PCP_ID	PCP ID	Text	25
PCP_Name	PCP Name	Text	25
PCP_Specialty	PCP Specialty (AMA Code)	Text	25
Provider_UPIN	Provider UPIN number	Text	10
Provider_Tax_ID	Provider federal tax identification	Text	15
Provider_License	Provider Texas license number	Text	25
Entity_processing	Name of Entity that processed claim (e.g. United, name of TPA or delegated entity)	Text	25
Cap_FFS	Is claim paid via capitation or FFS?	Text	4
Code_change	Was/Were code(s) changed between the time of submission and time of claim payment?	Text	2 (Y/N)
Re-Bundled_claim	Was/Were submitted code(s) re-bundled with other claim lines?	Text	2 (Y/N)
Per_Diem	Was claim paid on per diem basis?	Text	2 (Y/N)

## HMO DOCUMENT EXAMINATION, EXHIBIT C

### Specific Electronic Data Document Class 4 Capitation

To assure that United understands the data elements requested in Document Class 4, below are specific instructions and descriptions for production of Class 4 documents.

It is CPD's understanding that the detail data and documentation used to calculate the monthly capitation payment to the provider for capitated services should include a record for each member (covered life) covered by the capitation payment; the member age/sex/benefits data; any and all other data used to determine the member count, capitation rate (Per Member Per Month); and the actual amount paid. Although capitation and eligibility are related files, eligibility data seldom matches the capitation data or the capitation check amount because they are run at different times.

Two electronic data document capitation files are required for each of the months specified in Class 4 below; one file showing information as it was available to the provider, from United, during that month, and one file showing information as it exists with all retroactive additions, deletions and adjustments incorporated as of March 28, 2002. Each of the two files for a particular month should contain the same data elements for each record.

There should be two separate files for each month showing each member (covered life) for whom the provider(s) was/were paid capitation for that month. The 32 separate files should be labeled as follows:

1) Capitation as it was available to the provider, from United, during that month.

Example: Jan2000cap.txt will contain requested capitation information as it was available to the provider, from United, in January of 2000.

Jan2000cap.txt	Jan2001cap.txt	Jan2002cap.txt
Feb2000cap.txt	Feb2001cap.txt	Feb2002cap.txt
Mar2000cap.txt	Mar2001cap.txt	
Apr2000cap.txt	Apr2001cap.txt	
May2000cap.txt	May2001cap.txt	
Jun2000cap.txt	Jun2001cap.txt	
Jul2000cap.txt	Jul2001cap.txt	
Aug2000cap.txt	Aug2001cap.txt	
Sep2000cap.txt	Sep2001cap.txt	
Oct2000cap.txt	Oct2001cap.txt	
Nov2000cap.txt	Nov2001cap.txt	
Dec2000cap.txt	Dec2001cap.txt	

2) Capitation as it exists with all retroactive adjustments as of March 28, 2002.

Jan2000acap.txt	Jan2001acap.txt	Jan2002acap.txt
Feb2000acap.txt	Feb2001acap.txt	Feb2002acap.txt
Mar2000acap.txt	Mar2001acap.txt	
Apr2000acap.txt	Apr2001acap.txt	
May2000acap.txt	May2001acap.txt	
Jun2000acap.txt	Jun2001acap.txt	
Jul2000acap.txt	Jul2001acap.txt	
Aug2000acap.txt	Aug2001acap.txt	
Sep2000acap.txt	Sep2001acap.txt	
Oct2000acap.txt	Oct2001acap.txt	
Nov2000acap.txt	Nov2001acap.txt	
Dec2000acap.txt	Dec2001acap.txt	

Adjusted count -- if the capitation amount is adjusted for age/sex/benefit (hereafter, "ASB"), severity, morbidity, or other factors, please include documentation describing how the adjusted count is determined. Also include an electronic file with any look up tables and/or data dictionaries, or similar information, necessary to calculate adjustment to the count and/or the percent of premium payment. The layout of the look up table(s) and/or data dictionary(ies) should also be provided in the electronic file. As with all electronic files requested, this electronic file should be PC Compatible.

The following Data Elements (Fields) are requested for each record of the 52 Class 4 Electronic Data Document Files described above:

<u>Name</u>	<u>Description</u>	<u>Data Type</u>	<u>Length</u>
Month	Month capitation payment is for	Text	8 (mmddyyyy)
Mbr_ID	Member ID	Text	25
Mbr_Age	Member Age on first day of month	Text	3
Mbr_Sex	Member Sex (M, F, U)	Text	2
Mbr_DOB	Member Date of Birth	Text	8 (mmddyyyy)
PCP_ID	Primary Care Physician ID	Text	25
CapIPA_ID	ID for IPA/GROUP paid by capitation	Text	25
IPAName	IPA OR GROUP Name	Text	25
Adjusted_count	see definition and instructions above	Text	8
Retro_add	Record of member added as retro adjustment	Text	2 (Y/N)
Retro_delete	Record of member deleted as retro adjustment	Text	2 (Y/N)
Cap_CheckNbr	Financial institution issued number of check used to pay capitation to each provider	Text	20
Cap_CheckAmt	Amount of Capitation check for month	Text	11
Cap_Date_Paid	Date Capitation check was issued	Text	8 (mmddyyyy)
Product		Text	25
Plan		Text	25
LOB	Line of Business	Text	25
Benefit	Benefit Set	Text	25
Withhold_amt	Amount withheld	Text	11

**HMO DOCUMENT EXAMINATION, EXHIBIT C**  
**Specific Electronic Data Document Class 5**  
**Adjudication Logic**

For Electronic Data Document Class 5, produce an electronically formatted, PC compatible electronic file copy of any logic or rules used to value or pay claims in any manner other than a direct lookup of the fee schedule amount corresponding to the procedure on: 1) the submitted claim; 2) the provider contract; and 3) the member plan.

This request includes any and all logic and/or other rules:

1. used to process or pay claims submitted for/with multiple procedures, or assistant surgeon(s), or modifiers; or
2. used to upcode, downcode, bundle, or re-bundle claims; or
3. used to process out of area claims; or
4. used to process out of network claims; or
5. used to process and/or calculate rates and/or discounts applied to payment of any particular claim(s).

**HMO DOCUMENT EXAMINATION, EXHIBIT C**  
**Specific Computer Based Document Class 6**  
**Check Register**

To assure that United understands the data elements requested in document Class 6, below are specific additional instructions and definitions for production of Class 6 documents.

Class 6 requests the Register record of each check issued to an IPA/Group, or other provider, to pay any and all claim(s) for services. This information includes a list of each claim, covered by each check. If a prior claim is reversed or overpaid, and that reversed or overpaid amount is deducted from a check issued to pay another claim(s), the file should include the number(s) of the "Recoup\_ClaimNmbr" for the claim being recouped and the "Recoup\_ClaimAmt" deducted as recouppment for that particular prior claim(s).

There should be one file for each month with information for each check issued that month to pay any claim(s) or capitation. Example: Jan00check.txt should include all checks issued in January 2000 regardless of the date of service.

There should be 26 separate check register files labeled as follows:

- |                |                |                |
|----------------|----------------|----------------|
| Jan00check.txt | Jan01check.txt | Jan02check.txt |
| Feb00check.txt | Feb01check.txt | Feb02check.txt |
| Mar00check.txt | Mar01check.txt |                |
| Apr00check.txt | Apr01check.txt |                |
| May00check.txt | May01check.txt |                |
| Jun00check.txt | Jun01check.txt |                |
| Jul00check.txt | Jul01check.txt |                |
| Aug00check.txt | Aug01check.txt |                |
| Sep00check.txt | Sep01check.txt |                |
| Oct00check.txt | Oct01check.txt |                |
| Nov00check.txt | Nov01check.txt |                |
| Dec00check.txt | Dec01check.txt |                |

Each field provided for each Class 6 record should correlate to the check number for that record.

The following Data Elements (Fields) are requested for each record of the 26 Class 6 Electronic Data Document Files described above:

<u>Name</u>	<u>Description</u>	<u>Data Type</u>	<u>Length</u>
Check Number	Financial institution issued number on check	Text	25
Claim_Number	Claim Number	Text	25
Claim_Suffix	Claim Suffix	Text	25
Provider_ID	Provider ID	Text	25
CapIPA_ID	ID for IPA/Group paid by capitation	Text	11
Check_amount	Total amount of check	Text	11
Amount_ClaimPaid	Amount of check applied to the claim number	Text	8 (mrrddyyyy)
Date Issued	Date check issued	Text	8 (mrrddyyyy)
Date Cleared	Date check cleared bank	Text	8 (mrrddyyyy)
Cap_Month	Month capitation amount applies to	Text	25
Recoup_ClaimNbr		Text	11
Recoup_ClaimAmt		Text	11

HMO DOCUMENT EXAMINATION, EXHIBIT D

This sample format indicates how the electronic data files produced for

Exhibit C  
Class 6  
Check Register

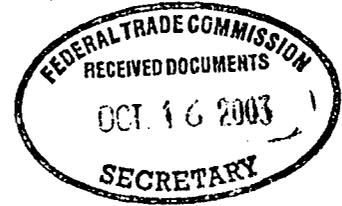
should appear if printed out (in table format) from the electronic data file.

**EXHIBIT B**  
**[Not included in public version.]**

**EXHIBIT C**  
**[Not included in public version.]**

**Appendix D**  
Protective Order Governing Material Within This Motion

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of )  
)  
)

North Texas Specialty Physicians, )  
Respondent. )  
)

Docket No. 9312

**PROTECTIVE ORDER  
GOVERNING DISCOVERY MATERIAL**

For the purpose of protecting the interests of the parties and third parties in the above captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

1. "Matter" means the matter captioned *In the Matter of North Texas Specialty Physicians*, Docket Number 9312, pending before the Federal Trade Commission, and all subsequent appellate or other review proceedings related thereto.
2. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this Matter.
3. "North Texas Specialty Physicians" means North Texas Specialty Physicians, a non-profit

corporation organized, existing, and doing business under and by virtue of the laws of Texas, with its office principal place of business at 1701 River Run Road, Suite 210, Fort Worth, TX 76107.

4. "Party" means either the FTC or North Texas Specialty Physicians.
5. "Respondent" means North Texas Specialty Physicians.
6. "Outside Counsel" means the law firms that are counsel of record for Respondent in this Matter and their associated attorneys; or other persons regularly employed by such law firms, including legal assistants, clerical staff, and information management personnel and temporary personnel retained by such law firm(s) to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter; provided that any attorney associated with Outside Counsel shall not be a director, officer or employee of Respondent. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.
7. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. For purposes of Confidential Discovery Material of a Third Party that either is in the possession, custody or control of the FTC or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided the Confidential Discovery Material to the FTC. The Producing Party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of the FTC.
8. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a party to this Matter and their employees, directors, officers, attorneys

and agents.

9. "Expert/Consultant" means experts or other persons who are retained to assist Complaint Counsel or Respondent's counsel in preparation for trial or to give testimony at trial.

10. "Document" means the complete original or a true, correct and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored or reproduced, including, but not limited to, any writing, letter, envelope, telegraph meeting minute, e-mails, e-mail chains, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, tariff, tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, desk pad, telephone message slip, note of interview or communication or any other data compilation, including all drafts of all such documents. "Document" also includes every writing, drawing, graph, chart, photograph, phono record, tape, compact disk, video tape, and other data compilations from which information can be obtained, and includes all drafts and all copies of every such writing or record that contain any commentary, notes, or marking whatsoever not appearing on the original.

11. "Discovery Material" includes without limitation deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, documents produced pursuant to compulsory process or voluntarily in lieu thereof, and any other documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter.

12. "Confidential Discovery Material" means all Discovery Material that is designated by a Producing Party as confidential and that is covered by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and Commission Rule of Practice § 4.10(a)(2), 16 C.F.R. § 4.10(a)(2); or Section 26(c)(7) of the Federal Rules of Civil Procedure and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which to Respondent or Third Parties would cause substantial commercial harm or personal embarrassment to the disclosing party. The following is a nonexhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product roadmaps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material.

#### TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose, except that with notice to the Producing Party, a Party may apply to the Administrative Law Judge for approval of the use or disclosure of any Discovery Material, or information derived therefrom, for any other proceeding. Provided,

however, that in the event that the Party seeking to use Discovery Material in any other proceeding is granted leave to do so by the Administrative Law Judge, it will be required to take appropriate steps to preserve the confidentiality of such material. Additionally, in such event, the Commission may only use or disclose Discovery Material as provided by (1) its Rules of Practice, Sections 6(f) and 21 of the Federal Trade Commission Act and any cases so construing them; and (2) any other legal obligation imposed upon the Commission. The Parties, in conducting discovery from Third Parties, shall attach to such discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

2. This paragraph concerns the designation of material as “Confidential” and “Restricted Confidential, Attorney Eyes Only.”

(a) Designation of Documents as CONFIDENTIAL - FTC Docket No. 9312.

Discovery Material may be designated as Confidential Discovery Material by Producing Parties by placing on or affixing, in such manner as will not interfere with the legibility thereof, the notation “CONFIDENTIAL - FTC Docket No. 9312” (or other similar notation containing a reference to this Matter) to the first page of a document containing such Confidential Discovery Material, or, by Parties by instructing the court reporter to denote each page of a transcript containing such Confidential Discovery Material as “Confidential.” Such designations shall be made within fourteen days from the initial production or deposition and constitute a good-faith representation by counsel for the Party or Third Party making the designations that the document constitutes or contains “Confidential Discovery Material.”

(b) Designation of Documents as "RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY – FTC Docket No. 9312."

In order to permit Producing Parties to provide additional protection for a limited number of documents that contain highly sensitive commercial information, Producing Parties may designate documents as "Restricted Confidential, Attorney Eyes Only, FTC Docket No. 9312" by placing on or affixing such legend on each page of the document. It is anticipated that documents to be designated Restricted Confidential, Attorney Eyes Only may include certain marketing plans, sales forecasts, business plans, the financial terms of contracts, operating plans, pricing and cost data, price terms, analyses of pricing or competition information, and limited proprietary personnel information; and that this particularly restrictive designation is to be utilized for a limited number of documents. Documents designated Restricted Confidential, Attorney Eyes Only may be disclosed to Outside Counsel, other than an individual attorney related by blood or marriage to a director, officer, or employee or Respondent, Complaint Counsel; and to Experts/Consultants (paragraph 4(c), hereof). Such materials may not be disclosed to Experts/Consultants or to witnesses or deponents at trial or deposition (paragraph 4(d) hereof), except in accordance with subsection (c) of this paragraph 2. In all other respects, Restricted Confidential, Attorney Eyes Only material shall be treated as Confidential Discovery Material and all references in this Protective Order and in the exhibit hereto to Confidential Discovery Material shall include documents designated Restricted Confidential, Attorney Eyes Only.

(c) Disclosure of Restricted Confidential, Attorney Eyes Only Material To Witnesses or Deponents at Trial or Deposition.

If any Party desires to disclose Restricted Confidential, Attorney Eyes Only material to witnesses or deponents at trial or deposition, the disclosing Party shall notify the Producing Party of its desire to disclose such material. Such notice shall identify the specific individual to whom the Restricted Confidential, Attorney Eyes Only material is to be disclosed. Such identification shall include, but not be limited to, the full name and professional address and/or affiliation of the identified individual. The Producing Party may object to the disclosure of the Restricted Confidential, Attorney Eyes Only material within five business days of receiving notice of an intent to disclose the Restricted Confidential, Attorney Eyes Only material to an individual by providing the disclosing Party with a written statement of the reasons for objection. If the Producing Party timely objects, the disclosing Party shall not disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual, absent a written agreement with the Producing Party, order of the Administrative Law Judge or ruling on appeal. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified individual. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 6(b) of this Protective Order. If the Producing Party does not object to the disclosure of Restricted Confidential, Attorney Eyes Only material to the identified individual within five business days, the disclosing Party may disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual.

(d) Disputes Concerning Designation or Disclosure of Restricted Confidential, Attorney Eyes Only Material.

Disputes concerning the designation or disclosure of Restricted Confidential, Attorney Eyes Only material shall be resolved in accordance with the provisions of paragraph 6.

(e) No Presumption or Inference.

No presumption or other inference shall be drawn that material designated Restricted Confidential, Attorney Eyes Only is entitled to the protections of this paragraph.

(f) Due Process Savings Clause.

Nothing herein shall be used to argue that a Party's right to attend the trial of, or other proceedings in, this Matter is affected in any way by the designation of material as Restricted Confidential, Attorney Eyes Only.

3. All documents heretofore obtained by the Commission through compulsory process or voluntarily from any Party or Third Party, regardless of whether designated confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews and depositions, that were obtained during the pre-complaint stage of this Matter shall be treated as "Confidential," in accordance with paragraph 2(a) on page five of this Order. Furthermore, Complaint Counsel shall, within five business days of the effective date of this Protective Order, provide a copy of this Order to all Parties or Third Parties from whom the Commission obtained documents during the pre-Complaint investigation and shall notify those Parties and Third Parties that they shall have thirty days from the effective date of this Protective Order to determine whether their materials qualify for the higher protection of Restricted Confidential, Attorney Eyes Only and to so designate such documents.

4. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone except to:

(a) Complaint Counsel and the Commission, as permitted by the Commission's Rules of Practice;

(b) Outside Counsel, other than an individual attorney related by blood or marriage to a director, officer, or employee or Respondent;

(c) Experts/Consultants (in accordance with paragraph 5 hereto);

(d) witnesses or deponents at trial or deposition;

(e) the Administrative Law Judge and personnel assisting him;

(f) court reporters and deposition transcript reporters;

(g) judges and other court personnel of any court having jurisdiction over any appeal proceedings involving this Matter; and

(h) any author or recipient of the Confidential Discovery Material (as indicated on the face of the document, record or material), and any individual who was in the direct chain of supervision of the author at the time the Confidential Discovery Material was created or received.

5. Confidential Discovery Material, including material designated as "Confidential" and "Restricted Confidential, Attorney Eyes Only," shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant, unless such Expert/Consultant agrees in writing:

(a) to maintain such Confidential Discovery Material in locked rooms or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;

(b) to return such Confidential Discovery Material to Complaint Counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of the Expert/Consultant's assignment or retention or the conclusion of this Matter;

(c) to not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

(d) to use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

6. This paragraph governs the procedures for the following specified disclosures and challenges to designations of confidentiality.

(a) Challenges to Confidentiality Designations.

If any Party seeks to challenge a Producing Party's designation of material as Confidential Discovery Material or any other restriction contained within this Protective Order, the challenging Party shall notify the Producing Party and all Parties to this action of the challenge to such designation. Such notice shall identify with specificity (i.e., by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation

within five business days of receiving notice of the confidentiality challenge by providing the challenging Party and all Parties to this action with a written statement of the reasons for the designation. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party, preserving its rights, and the challenging Party shall meet and confer in good faith in an attempt to negotiate changes to any challenged designation. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the challenging Party may make written application to the Administrative Law Judge as provided by paragraph 6(b) of this Protective Order. If the Producing Party does not preserve its rights within five business days, the challenging Party may alter the designation as contained in the notice. The challenging Party shall notify the Producing Party and the other Parties to this action of any changes in confidentiality designations.

Regardless of confidential designation, copies of published magazine or newspaper articles, excerpts from published books, publicly available tariffs, and public documents filed with the Securities and Exchange Commission or other governmental entity may be used by any Party without reference to the procedures of this subparagraph.

(b) Resolution of Disclosure or Confidentiality Disputes.

If negotiations under subparagraph 6(a) of this Protective Order have failed to resolve the issues, a Party seeking to disclose Confidential Discovery Material or challenging a confidentiality designation or any other restriction contained within this Protective Order may make written

application to the Administrative Law Judge for relief. Such application shall be served on the Producing Party and the other Party, and be accompanied by a certification that the meet and confer obligations of this paragraph have been met, but that good faith negotiations have failed to resolve outstanding issues. The Producing Party and any other Parties shall have five business days to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the Administrative Law Judge of the propriety of a requested disclosure or change in designation.

7. Confidential Discovery Material shall not be disclosed to any person described in subparagraphs 4(c) and 4(d) of this Protective Order until such person has executed and transmitted to Respondent's counsel or Complaint Counsel, as the case may be, a declaration or declarations, as applicable, in the form attached hereto as Exhibit "A," which is incorporated herein by reference. Respondent's counsel and Complaint Counsel shall maintain a file of all such declarations for the duration of the litigation. Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter, and all such copies or reproductions shall be subject to the terms of this Protective Order. If the duplication process by which copies or reproductions of Confidential Discovery Material are made does not preserve the confidentiality designations that appear on the original documents, all such copies or reproductions shall be stamped "CONFIDENTIAL – FTC Docket No. 9312."

8. The Parties shall not be obligated to challenge the propriety of any designation or

treatment of information as confidential and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to persons not referred to in paragraph 4. If Confidential Discovery Material is produced without the legend attached, such document shall be treated as Confidential from the time the Producing Party advises Complaint Counsel and Respondent's counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked documents.

9. If the FTC: (a) receives a discovery request that may require the disclosure by it of a Third Party's Confidential Discovery Material; or (b) intends to or is required to disclose, voluntarily or involuntarily, a Third Party's Confidential Discovery Material (whether or not such disclosure is in response to a discovery request), the FTC promptly shall notify the Third Party of either receipt of such request or its intention to disclose such material. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Third Party at least five business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Third Party of its rights hereunder.

10. If any person receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Confidential Discovery Material, the subpoena recipient promptly shall notify the Producing Party of receipt of such request. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Producing Part at least five business days before production, and shall include a copy of this Protective Order and a cover letter that

will apprise the Producing Party of its rights hereunder. The Producing Party shall be solely responsible for asserting any objection to the requested production. Nothing herein shall be construed as requiring the subpoena recipient or anyone else covered by this Order to challenge or appeal any such order requiring production of Confidential Discovery Material, or to subject itself to any penalties for noncompliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission.

11. This Order governs the disclosure of information during the course of discovery and does not constitute an *in camera* order as provided in Section 3.45 of the Commission's Rules of Practice, 16 C.F.R. § 3.45.

12. Nothing in this Protective Order shall be construed to conflict with the provisions of Sections 6, 10, and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 50, 57b-2, or with Rules 3.22, 3.45 or 4.11(b)-(e), 16 C.F.R. §§ 3.22, 3.45 and 4.11(b)-(e).<sup>1</sup>

Any Party or Producing Party may move at any time for *in camera* treatment of any Confidential Discovery Material or any portion of the proceedings in this Matter to the extent necessary for proper disposition of the Matter. An application for *in camera* treatment must meet the standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999) and *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000) and must be supported by a

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<sup>1</sup> The right of the Administrative Law Judge, the Commission, and reviewing courts to disclose information afforded *in camera* treatment or Confidential Discovery Material, to the extent necessary for proper disposition of the proceeding, is specifically reserved pursuant to Rule 3.45, 16 C.F.R. § 3.45.

declaration or affidavit by a person qualified to explain the nature of the documents.

13. At the conclusion of this Matter, Respondent's counsel shall return to the Producing Party, or destroy, all originals and copies of documents and all notes, memoranda, or other papers containing Confidential Discovery Material which have not been made part of the public record in this Matter. Complaint Counsel shall dispose of all documents in accordance with Rule 4.12, 16 C.F.R. § 4.12.

14. The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party or further order of the Administrative Law Judge hearing this Matter, continue to be binding after the conclusion of this Matter.

15. This Protective Order shall not apply to the disclosure by a Producing Party or its Counsel of such Producing Party's Confidential Discovery Material to such Producing Party's employees, agents, former employees, board members, directors, and officers.

16. The production or disclosure of any Discovery Material made after entry of this Protective Order which a Producing Party claims was inadvertent and should not have been produced or disclosed because of a privilege will not automatically be deemed to be a waiver of any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of such claimed inadvertent production or disclosure, the following procedures shall be followed:

(a) The Producing Party may request the return of any such Discovery

Material within twenty days of discovering that it was inadvertently produced or disclosed (or inadvertently produced or disclosed without redacting the privileged content). A request for the return of any Discovery Material shall identify the specific Discovery Material and the basis for asserting that the specific Discovery Material (or portions thereof) is subject to the attorney-client privilege or the work product doctrine and the date of discovery that there had been an inadvertent production or disclosure.

(b) If a Producing Party requests the return, pursuant to this paragraph, of any such Discovery Material from another Party, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control—including all copies in the possession of experts, consultants, or others to whom the Discovery Material was provided—unless the Party asked to return the Discovery Material in good faith reasonably believes that the Discovery Material is not privileged. Such good faith belief shall be based on either (i) a facial review of the Discovery Material, or (ii) the inadequacy of any explanations provided by the Producing Party, and shall not be based on an argument that production or disclosure of the Discovery Material waived any privilege. In the event that only portions of the Discovery Material contain privileged subject matter, the Producing Party shall substitute a redacted version of the Discovery Material at the time of making the request for the return of the requested Discovery Material.

(c) Should the Party contesting the request to return the Discovery Material pursuant to this paragraph decline to return the Discovery Material, the Producing Party seeking return of the Discovery Material may thereafter move for an order compelling the return of the

Discovery Material. In any such motion, the Producing Party shall have the burden of showing that the Discovery Material is privileged and that the production was inadvertent.

17. Entry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provisions of this Protective Order.

ORDERED:

  
D. Michael Chappell  
Administrative Law Judge

Date: October 16, 2003

## **APPENDIX E**

### **Pages of Motion Subject to Protective Order**

**(In addition, the entirety of Exhibits B and C are subject to the Protective Order)**

**[Not included in public version.]**